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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Philippe Bertrand

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EXAMINER

CHAWLA, JYOTI

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/521,579	Applicant(s) BERTRAND ET AL.	
	Examiner JYOTI CHAWLA	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 February 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 4, 8, 10 and 13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,4,8,10 and 13 is/are rejected.
- 7) ☒ Claim(s) 4,8 and 10 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>11/13/2008</u> | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicant's submission filed on February 6, 2009 has been entered as compliant. Claims 2-3, 5-7, 9, 11-12 have been cancelled, claims 1,4, 8, 10 have been amended and claim 13 has been added to the current application. Claims 1, 4, 8, 10 and 13 are pending and examined in the current application.

Information Disclosure Statement

The Japanese reference (JP 49-74278) listed in the information disclosure statement filed 11/13/2008 fails to comply with 37 CFR 1.98(a)(2), which requires a legible copy of each cited foreign patent document; each non-patent literature publication or that portion which caused it to be listed; and all other information or that portion which caused it to be listed. The submission of English translation of claim and examples from the Japanese reference (JP 49-74278), without the original document, is received. It has been placed in the application file, but the information referred to therein has not been considered.

Specification

Applicants' amendments to the specification correcting typographical errors have been entered. The objections of 6/26/08 have been withdrawn

Claim Objections

Claims 4, 8 and 10 are once again objected for the recitation of phrase "characterized in that". Correction is required.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

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Rejection of Claims 1-2 and 11 under 35 U.S.C. 102(b) as being anticipated by Baugher et al. (US 4098913) has been withdrawn based on applicant's amendments.

Rejection of Claims 1, 4 and 11 -12 under 35 U.S.C. 102(b) as being anticipated by Willi et al. (US 4363824) has been withdrawn based on applicant's amendments.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

1) Rejection of Claims 1-5, 7, 9-12 under 35 U.S.C. 103(a) as being unpatentable over Itagaki et al (EP 0564787 A2) has been withdrawn based on applicant's amendments.

2) Claims 1, 4, and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Duffett (WO 98/13133) in view of Itagaki et al (EP 0564787 A2), hereinafter Itagaki.

Note: Gelatin substitute as defined by the specification does not have gelling properties like gelatin, however, has stabilization properties like gelatin and can be added to culinary preparations which are heated above 60⁰C. (Original disclosure, page 2, line 29-page3, line 10).

Regarding claim 1, Duffett teaches of powdered form of cocoa butter (e.g., Page 12, line 31 to page 13, line 20). Cocoa butter as taught by Duffett is a vegetable fat with at least 99 weight % cocoa butter and thus is a non-gelling gelatin substitution product, as claimed.

Duffett is silent as to the cocoa butter being deodorized. Itagaki teaches of confectionery fat composition including deodorized cocoa butter (e.g., Page 3, lines 10-31). Regarding deodorizing cocoa butter to an extent of 90-95%, as recited in claim 1,

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Itagaki teaches of steam distillation method for deodorizing cocoa butter in the temperature range of 160 °C to 200 °C, which falls in the range of “approximately 160 °C” as disclosed by the applicant, thus, the deodorized cocoa butter of Itagaki includes 90-95% deodorized cocoa butter, as recited. Thus, deodorized cocoa butter was known and available at the time of the invention. Cocoa butter typically has strong flavor, which is undesirable if the cocoa butter is to be incorporated into food products which are not cocoa butter flavored, e.g., in vanilla or fruit flavored products (For example, see Itagaki, Page 3, lines 9-12).. Deodorized cocoa butter as taught by Itagaki, does not have a strong flavor, and thus can be advantageously incorporated in food products of various flavors. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Duffett and use deodorized cocoa butter to make the powder form. One of ordinary skill would have been motivated to modify Duffett at least for the purpose of removing the undesirable cocoa butter flavor and making the fat based powdered product more versatile and usable in foods with other flavors, such as vanilla and fruit flavors etc., as taught by Itagaki (Page 3, lines 9-12).

Regarding claim 4, Duffett teaches that a fat composition may also comprise color, flavor and or vitamins, typically, oil soluble vitamins (Page 8, lines 14-21). It is noted that oil soluble vitamins include vitamins A and E, which are antioxidants. Thus, Duffett teaches of powdered fat based products comprising antioxidants as recited.

Claim 10, recites of a method of incorporating a cocoa butter containing composition into a culinary preparation, wherein the culinary preparation has a moisture content of 40 to 50%. Duffett teaches of chocolate, cereals, ice cream, chocolate drinks, chilled products etc., made by incorporating the cocoa butter powder (e.g., see Page 13, lines 1-20), i.e., culinary preparations containing the recited product. Regarding the moisture content, it is noted that the moisture content of a given food can be obtained by subtracting the total solids weight from the total food weight. Since Duffett teaches of incorporation of cocoa butter containing product in culinary preparations ranging from very low moisture content cereals to high moisture content ice creams and drinks etc.,

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therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to use Duffett's cocoa butter product in culinary preparations with moisture content of 40-50%.

3) Claims 8 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Duffett in view of Itagaki, further in view of Kawabata et al (US 5460847), hereinafter Kawabata.

Duffett in view of Itagaki have been relied on for the rejection of claim 1 above.

Claim 8, recites a method of incorporating the product comprising at least 99% of cocoa butter powder in a culinary preparation by directly adding into the preparation when the latter is heated to a temperature of greater than 60°C. Claim 13 recites of subsequently cooling the resulting culinary preparation.

Duffett teaches of chocolate, cereals, ice cream, chocolate drinks, chilled products etc., made by incorporating the cocoa butter powder (e.g., see Page 13, lines 1-20), i.e., product is incorporated directly into the preparation. Regarding the temperature limitation of "heating the food product to greater than 60°C", Duffett is silent. However, heating a culinary preparation to a temperature greater than 60°C and adding components while the product is being cooked or heated was well known in the art at the time of the invention. For example, in the making of chocolate (a culinary preparation also disclosed by Duffett), it was known to heat the components to a temperature of 65-70°C (Kawabata, Column 3, lines 9-11) and then adding fats and oils including cocoa butter (Kawabata, Column 2, lines 32-37), as recited in claim 8.

Kawabata also teaches of cooling the resulting emulsion to less than 40°C (Column 3, lines 18-20), which includes applicants' recited temperature range for claim 13.

Kawabata teaches an emulsion that has good workability and does not experience oil separation (e.g., Column 1, lines 42-50). Thus, incorporating a product comprising 99% or more cocoa butter in powder form in foods, such as, chocolate, was known in the art (Duffett). Further, heating to a temperature of 60°C or higher and adding fat based products, such as, cocoa butter, and then cooling the resulting product to make

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chocolate product was also well known in the art at the time of the invention, as taught by Kawabata (Column 3). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Duffett in view of Kawabata and heat the chocolate making components to a temperature range above 60°C as taught by Kawabata, before adding the cocoa butter product and subsequently cooling the emulsion to less than 40°C. One of ordinary skill would have been motivated to modify Duffett at least for the purpose of obtaining an emulsion which has good workability and does not suffer from oil separation upon heating and subsequent cooling to a desired use temperature.

Furthermore, regarding claim 13, as recited, it is noted that any culinary preparation (to which heat is not applied), when left at room temperature over a period of time will cool to "room temperature". Thus, the property of the product recited in claim 13, is also possessed by the chocolate product of Duffett.

Response to Arguments

Applicant's arguments of 2/6/2009 with respect to claims have been considered but are moot in view of the new ground(s) of rejection and the claims 1, 4, 8, 10 and 13 are rejected for reasons of record.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JC/
Examiner
Art Unit 1794

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794